80 No. 2028

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

BARRY LEE REID,

Petitioner - Defendant,

vs.

UNITED STATES OF AMERICA,

Respondent - Plaintiff.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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and
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QUESTIONS PRESENTED

Did the Court of Appeals err in holding that it was reasonable for the magistrate reviewing an affidavit in support of a search warrant to expect that certain written material would be found at Petitioner's offices nine months after all criminal activity had ceased?

Did the Court of Appeals err in holding that the time lapse of nine months between termination of criminal activity and issuance of the search warrant did not destroy probable cause to believe blank identification cards and birth certificates would still be at Petitioner's offices?

Did the Court of Appeals err in holding that the District Court did not abuse its discretion in allowing the Government to impeach Petitioner by the use of eight year old false statements contained in letters written by Petitioner?

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NO. .....

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OPINION BELOW

The opinion of the Court of Appeals below (Appendix A, infra, p 1, is reported in _____ F.2d _____. No opinion was rendered by the District Court below.

JURISDICTION

Petitioner was convicted in the District Court for the Central District of California of six counts of mail fraud, under Title 18 United States Code, Section 1341.

The judgment of the Court of Appeals below (Appendix B infra, p 1) was entered on December 24, 1980. A rehearing and a rehearing in banc were sought. Both were denied by an order entered March 30, 1981.

Jurisdiction of this Court is invoked under 28 United States Code Section 1254 (1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fourth Amendment, United States Constitution which provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particulary describing the place to be searched,

and the persons or things to be seized."

2. Federal Rules of Evidence, rule 608 (b) (1) which provides in pertinent part:

"Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence They may, however, in the discretion of the court, if probative of truthfullness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his

character for truthfulness or untruthfulness, . . ."

3. The statute under which Petitioner was prosecuted was 18 United States Code, Section 1341, which provided as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything

United States of America v. Barry Lee Reid, Criminal No. 79-476, alleging Petitioner committed violations of Title 18, United States Code, Section 1341, mail fraud.

On July 27, 1979, a motion to suppress evidence seized pursuant to the search warrant was heard in the United States District Court for the Central District of California. The motion was denied.

On August 2, 1979, Petitioner's jury trial commenced in the United States District Court for the Central District of California. During the course of the trial, Petitioner's motion for judgment of acquittal was granted as to six counts, namely counts VII through XII. The trial lasted three days; and,

or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

To place in context the questions now raised, the facts can be stated briefly:

A. Course of proceedings:

On May 10, 1978, a Federal Magistrate issued a search warrant for the offices of Eden Press, Petitioner's publishing business.

Later the same day, Petitioner's offices were searched, and the items mentioned in the search warrant were seized.

Thereafter, on June 14, 1979, a Federal Grand Jury in the Central District of California returned a twelve count Indictment, entitled

represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000

evidence obtained during the May 10, 1978 search was utilized by the Government both directly and indirectly against Petitioner during the trial to obtain his conviction.

Thereafter, on August 8, 1979, in the United States District Court for the Central District of California, the jury in the cause found Petitioner guilty on an Indictment then charging six counts of violation of Title 18 United States Code, Section 1341, mail fraud.

Subsequently, the District Court, on September 17, 1979, entered judgment in the cause. Petitioner was sentenced to three (3) years imprisonment on each of the six (6) counts, to run concurrently, and was fined $1,000 on each count, a total of $6,000. This

judgment and sentence was affirmed by the Court of Appeals for the Ninth Circuit on December 24, 1980. Rehearing was denied on March 30, 1981, and this Petition for Certiorari follows.

B. Relevant facts pertaining to the underlying conviction for mail fraud:

Some of the relevant facts are contained in the Court of Appeals opinion of affirmance, but for the benefit of this Court will be briefly augmented herein.

On May 10, 1978, a postal inspector applied to a Federal Magistrate for the issuance of a search warrant for the premises known as-and located at Suites 209 and 211, 15751 Brookhurst Street, Westminster, California.

In the affidavit supporting his application for the search warrant, the postal inspector alleged that Petitioner had utilized the United States mails on several unspecified occasions during 1977 and at other unspecified times, in a mail fraud scheme.

Thereafter, in paragraph 12, he stated that he received an identification card and three birth certificates on August 19, 1977. The information was about ten (10) months old when incorporated into the affidavit.

On May 2, 1978 the postal inspector learned that Petitioner had changed the format and content of the birth certificates and identification cards from that of the type mentioned earlier in the

affidavit. It was this earlier format that formed the basis of the mail fraud allegation. He learned that this change occurred in August 1977 as the result of a Preliminary Injunction. This Injunction mandated the removal of the material the postal inspector deemed misleading; the gist of his claim of mail fraud.

The postal inspector was in possession of this information pertaining to the change in format, and incorporated it as paragraph 19g of the affidavit. This indicated the termination of any alleged mail fraud. It also removed the probability that the items sought remained on the premises of Petitioner's publishing business.

The warrant issued on May 10, 1978, and a search of Petitioner's premises was conducted the same day under the authority of the warrant. The following items A through F were seized. In the Court of Appeal's opinion of affirmance items, A through D were classified as "business records". For brevity, Petitioner will refer to these items using the same terminology as the Court below.

A. ID card sales records. These lists of Petitioner's pre-injunction customers were used by the postal inspectors to obtain the names, addresses and identity cards purchased by the six "victims" of the six

counts of which Petitioner was convicted.

B. ID card flyers. These were important to the Government's case. Containing four versions of Petitioner's identity cards, the Government argued they misled prospective purchasers.

C. Catalogue cards and book flyers. These advertising brochures were included in envelopes containing the identity card brochures sent to customers.

D. Copies of ads placed in periodicals. Petitioner's business relied solely on ads placed in periodicals. At trial, the Government

argued that the brief eye-catchers therein were fraudulent averments by Petitioner.

E. Letters written some eight years earlier by Petitioner.

F. ID card blank. The Government presented this to the jury as it described through witnesses the methods of actual manufacture of the identity cards in question.

Petitioner objected to the admission of all this evidence on the grounds that it was the product of an unreasonable search and seizure because the affidavit in support of the search warrant was based on stale information.

A book publisher since 1971, Petitioner began distributing a form of identification card in 1973. The trial concentrated on his methods of distributing identity cards between June 1974 and September 1977, with emphasis on the advertising material he distributed in the form of advertisements in monthly magazines, fliers depicting and describing the identity cards in question, fliers advertising Petitioner's books and catalogue cards describing the subject matter of these books. This material clearly indicated the lack of Governmental sponsorship. The identity card flier also stated the cards were produced by Petitioner's company, EDEN PRESS, not a Government Agency.

The card fliers were advertising brochures that contained ample indicia that the ID cards were being distributed by a privately owned printing company in Fountain Valley, Califoria. The Government's claim of mail fraud must be inferred from these advertisements. Thus, Petitioner's testimony concerning his intent became the deciding factor in a very close case.

Testifying in his defense to the mail fraud allegations, Petitioner told the jury that he started a publishing company called EDEN PRESS in 1971. He started the business by publishing a book entitled "The Paper Trip". This book generated a number of inquiries for identity cards. By the latter part of 1973, he produced his first

identity card. Gradually improving their appearance, he began producing the cards introduced at trial in June, 1975. The Government sought to remedy its deficiencies in evidence by bringing before the jury certain letters, containing false statements, written by Petitioner some eight years earlier.

Specifically, during cross-examination, the Government introduced a 1971 letter which Petitioner wrote to a Government Agency while researching a book. This letter was written under a false name, title, return address, sponsorship and purpose. Petitioner objected to this as improper cross-examination.

The Government then placed another letter, written to the Department of Motor Vehicles, before

Petitioner. Admitting that he wrote the letter, he could not recall if it had been mailed. The Government then directed the following question to Petitioner: "You stated in this letter, 'My firm has been hired to develop a training manual for a new sales force to cover all fifty states.'" The Court pointed out the letters were not in evidence and sustained Petitioner's objections concerning references to them. Nonetheless, the Government asked Petitioner: "That statement was not true, was it?" The District Court again sustained Petitioner's objections concerning improper impeachment and excluded the letters.

EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the District Court for the Central District of California of six counts of mail fraud, under Title 18 United States Code, section 1341.

SUBSTANTIALITY OF QUESTIONS PRESENTED

A

The Court of Appeals has decided a federal question in conflict with applicable decisions of this Court.

Primarily, this case is one of an unreasonable search and seizure. Long before Petitioner's trial, this Court had held that a search warrant

was invalid unless the affidavit prepared to support the issuance thereof contained facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. Sgro v. United States, 287 U.S. 206, 210, (1932). Under the warrant clause of the Fourth Amendment, probable cause is indispensable. Brinegar v. United States, 338 U.S. 160, 175, (1948). Thus, this Court has required, as a condition of constitutional validity, a showing of timely probable cause that a crime has been committed, and that evidence thereof is upon the person or within the place to be searched at the time of issuance. Sgro, supra; Dunbra v. United States, 268 U.S. 435, (1925).

It is well established that evidence and the "fruit" thereof, obtained in violation of the warrant clause, is not admissible in a criminal prosecution such as Petitioner's. Weeks v. United States, 232 U.S. 383, (1914); Wong Sun v. United States, 371 U.S. 471, (1963).

Because of the nine month lapse of time between the termination of alleged illegal activity and the issuance of the warrant, the information articulated did not justify the conclusion of probable cause to believe that nine month old "business records" would then be on the premises of Petitioner's publishing business. The information in the affidavit was not timely, i.e., "closely related" to when the

warrant issued; therefore, it was void. Sgro, supra.

Clearly, the trial testimony of the six persons, concerning the alleged mail fraud, admitted as evidence constituted the crux of the Government's case. Because their names were obtained from ID card sales records seized during the search, it is apparent that such sales records and testimony constituted links in the chain of evidence needed to convict him. Thus, it should have been excluded as the "fruit" of evidence seized under the warrant. Wong Sun, supra. All items classified as "business records", such as the ID card sales records, ID card flyers, catalogue cards, book flyers, and copies of ads placed in periodicals,

used to convict Petitioner should also have been excluded. Likewise, the letters used to impeach the Petitioner as well as the blank ID cards should not have been utilized by the Government. Weeks, supra. Petitioner claims the warrant is invalid under Sgro, thus the exclusionary rules of Weeks and Wong Sun automatically apply. However, the Court of Appeals below, in its decision to affirm, avoided the settled principles of Sgro, and did not apply them to the case at bar. No reasons were stated.

Instead, the Court below relied on another decision of this Court, Andresen v Maryland, 427 U.S. 463 (1976), and concluded that it was reasonable for the Magistrate to believe that Petitioner's pre-August

1977 "business records", as defined by the Court, would be at his office when the warrant was issued on May 10, 1978.

We respectfully urge that this decision is erroneous and at variance with criteria delineated within decisions of this Court in the following respects:

a) The records that would be generated and maintained in the ordinary course of business reason for affirming.

Petitioner believes this to be the crux of the Court of Appeal's decision, as it pertains to the Fourth Amendment. (Appendix A, infra, p. 12). It approved the seizure of Petitioner's pre-August 1977 flyers, catalogue cards ads,

and ID card sales records, which provided the names of the six persons ultimately testifying for the Government. Not only is this reasoning at variance with this Court's decision in Sgro, but also with Andresen.

The argument that it would be reasonable to expect that these "business records" would be found at the Eden Press offices simply ignores two critical points: First, a lapse of time of nine months, where the items are easily disposable, and the offense has terminated, does not establish that the dominant probability was that the material, then obsolete, would still be at a given place. "Business records" is not a sine qua non solution for determining staleness of probable cause.

Significant also is the fact that not all the items were records of the business. Although probable cause to believe a crime has been committed may endure indefinitely, such cause to believe seizable evidence pertaining to that crime is at the place to be searched cannot. Factors such as mobility, disposability and incriminating nature indicate that this aspect of probable cause will diminish with the passage of time. Secondly, no decision of this Court or a Court of Appeals has sanctioned the seizure of "business records", as defined by the Court below, in a case where there has been a termination of illegal activity and the "probable cause" information was of nine month vintage.

A search warrant permits a drastic invasion of privacy. The validity thereof should not turn on the simple expedient of classifying the items to be seized as "business records", irrespective of the time lapse between obtaining the information and issuance of the warrant and the true nature of the material. What should be decisive is the placement of "business records" in the context of surrounding facts such as the nature of the material as records, termination of the offense, their incriminating nature, disposability and lapse of time. Each of these factors must be scrutinized in developing the probable cause equation. It is a basic fact as noted by this Court in Sgro, where a continuing business and

only a ten day lapse of time were involved, that probable cause must be closely related to the time of issuance of the warrant. Nine months is not closely related. This warrant should now be deemed invalid due to the use of stale information, albeit concerning previously generated, now obsolete "business records". Andresen does not compel affirmance of the warrant. The business records seized there were current and dealt with a continuing, then existing land fraud transaction. Further, the information was only three months old, and the records had to remain in Andresen's possession to consummate the fraud. The contrary is true in the case at bar. Petitioner had, for nine months, been conducting business

consistent with a preliminary injunction. Therefore, it was not reasonable to assume that obsolete material would be maintained.

Thus, the principle relied upon by the Court below (Appendix A, infra, p 13-14) for permitting seizure and admission of items A through D, heretofore mentioned, as "business records", and the testimony of the six trial witnesses, discovered by "searching" the ID card sales records, has no relevance to this case. In the light of the fact that each was a link in the chain of evidence required to convict Petitioner, the conviction must be set aside.

b) The time lapse did not destroy probable cause reason for affirming.

This portion of the Court of Appeals opinion (Appendix A, infra, p 16-17) approved the seizure of pre-August 1977 blank identification cards and birth certificates. Although no blank birth certificates were offered in evidence, a blank identification card, known as a "data card" was admitted over Petitioner's objection.

Petitioner deems it unnecessary to repeat again the entire reasoning demonstrating that the time lapse did destroy probable cause, as set forth in opposition to the "business records" reason for affirming. Suffice it to say, the thrust of it is the same. The probability of

retaining blank identification cards that are incriminating and cannot be sold appears remote. In any case, the Court of Appeals fastened upon an intangible criteria to affirm this portion of the seizure. Namely, the rationale of: "If this stock had not been depleted by August or September 1977 . . . it would be reasonable to believe the unused stock would have remained at the Eden Press offices", (Appendix A, infra, p 15)is conditional. What if it had been depleted? No answer is provided. Close scrutiny of the affidavit reveals that the only order of blank identification cards in the form of Exhibit 6 to the affidavit, was in December 1976, nine months before the injunction forbad the use of that style of

card, not December 1977 as stated in the opinion. Such bootstrapping should not be approved in a case where a federal constitutional protection such as the Fourth Amendment is involved. Furthermore, the rationale is based upon a false premise. Namely, that the blanks were ordered in December 1977. This simply is not true; the order was in December 1976. Thus, this is not like Andresen where current records, needed to complete a fraud, were involved. Nor is it like the cases, United States v Steeves, 525 F.2d 33 (8th Cir. 1975) and United States v Lucarz, 430 F.2d 1051 (9th Cir. 1970) relied upon by the Court of Appeals below as justification for the holding that the time lapse did not destroy probable cause.

We respectfully suggest that the Court below misread them as applicable to the case at bar, and overlooked the settled rule of Sgro requiring that probable cause be current, i.e., closely related to the time the warrant is issued. Both cases, however, are different. Neither involved a long lapse of time; termination of illegal activity is unclear. Steeves (2 months) and Lucarz (5 days) simply do not measure up to the nine month delay in the present case which Petitioner suggests compels application of the principle enunciated in Sgro.

Thus, the criteria used by the Court below (Appendix A, infra, p 16-17) to affirm seizure and admission at trial of the blank

identification card has no relevance to this case. Since the conviction of Petitioner is based in part on the use of a blank identification card, the conviction must be set aside.

B

The Court of Appeals has rendered a decision in conflict with a prior decision of the Court of Appeals on the same matter.

Both the "business records" and the time lapse did not destroy probable cause reasons for affirming are in conflict with Durham v United States 403 F.2d 190 (9th Cir. 1968), a prior decision of the Court of Appeals authoring the opinion

below. At the time of Petitioner's criminal trial, the Court of Appeals, Ninth Circuit, in Durham, had previously held an affidavit insufficient where only four months had elapsed between probable termination of the activities described therein, and the issuance of the warrant. Durham concluded that the affidavit did not provide any basis for the commissioner to believe that counterfeit notes or paraphernalia were probably present at the place to be searched when the warrant issued. However, in reaching its decision to affirm, the Court of Appeals below avoided, sub silentio, the well established precedent of Durham, requiring probable cause to be current, and did not apply it to the case at bar.

An important point must be noted here. Durham followed this Court's mandate of Sgro that probable cause be closely related to when the warrant issues. Thus, Petitioner believes it unnecessary to repeat in its entirety the comments made in Part a, supra. Suffice it to say that they apply with equal force here. Not only did the Durham Court incorporate the rationale of Sgro as authority, but it followed the rule, stated in a long line of prior Court of Appeal cases, that even the most convincing proof that property was upon premises at some remote time in the past, did not justify a present invasion of privacy. (Durham footnote 4).

Petitioner can find no authority that has overruled Durham. Therefore, the opinion of the Court of Appeal is a drastic departure from that Court's own cardinal principle that probable cause must exist when the warrant issues, not some other time.

Here, the activities described by the warrant affidavit ended at least nine months before the warrant was issued. True, the items were present. But a search is never justified by what it reveals. And, the dominant probability was that the items to be seized would not remain on the premises for nine months.

This affidavit is weaker than the one in Durham. It contains specific information from which the

Magistrate should have concluded that the activities described therein terminated upon issuance of the injunction described in the affidavit. Quite clearly, then, this affidavit, unlike the one held invalid in Durham, actually provided a basis for a finding that the dominant probability was that the items sought by the warrant were not present at Petitioner's office when the warrant issued nine months after the injunction terminated any illegal activity.

This Court has consistently held the Fourth Amendment in high regard; a valuable safeguard. And, the essence of the warrant clause is that no warrant issue except upon probable cause. This standard must not be diminished. The

classification by the Court of Appeals below of so many items sought by the warrant as "business records" is quite irrelevant when considered by the Durham/Sgro standard of timely probable cause, i.e., that it be closely related to the date of the issuance of the warrant. Further, not all the items were records. Rather they were impliments used in the conduct of the business. Each is a decisive point. Neither Court below appears to have recognized the application of well settled principles of determining probable cause or the reality of the nature of the "records".

We respectfully submit that the Court of Appeals below, by utilizing the convenient label "business records" missed the mark of

ascertaining the appropriate Fourth Amendment standard of probable cause. This bypass of a constitutional requirement and well settled judicial principles overlooks the important constitutional right to be free from unreasonable searches and seizures.

The conviction must be set aside as it is based on the admission of evidence obtained, directly and indirectly, from this search which Petitioner deems unconstitutional.

C

The Court of Appeals has rendered a decision, concerning impeachment of a witness, in conflict with the decision of another federal court of appeals on the same matter.

The Court of Appeals below (Appendix A, infra, p 20) stated that it was proper to cross-examine Petitioner about false statements made in letters written by Petitioner eight years before the trial.

To reach this conclusion, the Court below relied on Federal Rules of Evidence, 608 (b)(1). This rule deals with cross-examination of a witness regarding specific instances of conduct about a witness's character for truthfulness or

untruthfulness, and Lyda v United States, 321 F.2d 788 (9th Cir. 1963).

We respectfully urge that this decision is erroneous in the following respects:

a) The Court did not abuse its discretion in allowing the Government prosecutor to elicit admissions from Petitioner about eight year old false statements in letters reason for affirming.

This portion of the Court of Appeal's opinion (Appendix A, infra, p 20) sanctioned the use of eight year old false statements contained in letters written by Petitioner. These eight year old statements were used to impeach Petitioner during cross-examination. The clear

purpose of this tactic was to reduce Petitioner's credibility in the eyes of the jury. And, Petitioner's defense was his credibility, as it pertained to intent to defraud.

In effect, the District Court agreed with Petitioner that this reference to the letters was improper cross-examination since it belatedly sustained the objection to them. The Court of Appeals, in its opinion of affirmance, nonetheless approved this method of cross-examination as complying with Federal Rules of Evidence 608 (b)(1).

In so holding, Petitioner believes that the Court of Appeal improperly relied on Lyda v United States, 321 F.2d 788 (9th Cir. 1963). In Lyda, the defendant was charged with being the getaway

driver in a robbery. One of the other robber's testimony was the only evidence incriminating Lyda. This accomplice also testified that one month prior to the robbery, he and Lyda had been arrested together on a burglary charge. The Court of Appeals held that this was improper because it only tended to show bad character and not to show a continuing scheme, motive, malice or the like.

This reliance on a case which held evidence inadmissible, should not be deemed authority for admissibility here. Further, it misses the point of Petitioner's objection. In Lyda the questioned improper specific conduct occurred one month before the alleged crime. Here, it occurred some eight years previously,

concerning an unrelated subject matter. The writing of a book, not the manufacture and sale of identity cards was the issue before the jury.

By so applying Lyda, the Court of Appeals holding is in conflict with two other Federal Court of Appeals cases, specifically United States v McClintic, 570 F.2d 685,(8th Cir. 1979) and Lloyd v United States, 226 F.2d 9 (5th Cir. 1955). McClintic pointed out that although remoteness is no longer an explicit factor in 608(b), it nevertheless is a consideration relevant to the probative value of the evidence. Lloyd held impeaching evidence inadmissible where more than eight years had elapsed between the prior event and trial because there was no logical probative value as to intent

regarding commission of the subsequent act other than general proof of his criminal tendencies. (See also Snyder v Coiner, 365 F Supp 321 1973 where the Court refused to allow cross-examination of 20 year old witness about a deposition taken at age 15).

To avoid the effect of the proffered evidence being offered simply to show a person's criminal tendencies, the prior acts must be similar to the one charged. Wolcher v United States, 200 F.2d 492 at 497 (9th Cir. 1952). Relying on the rule that the prior act must be so connected with the offense presently charged, in both point of time and circumstances as to throw light upon intent, Wolcher found error in the admission of a partnership return

unrelated to the tax matter at hand although it did reveal the possibility that chicanery was involved.

Clearly, letters written in researching a book in 1971 have little relation to the alleged fraudulent sale of identity cards some eight years later.

Although Federal Rules of Evidence, 608 (b)(1) permits impeachment with prior specific acts, it is silent as to the passage of time between the prior specific acts and the presently alleged criminal conduct. The Government, here, brought to the attention of a jury letters written, not necessarily mailed, to government agencies by the Petitioner eight years earlier. At trial, the paramount issue was whether or not Petitioner intended

to defraud prospective customers. Thus, although the District Court belatedly denied the admissibility of the evidence in the form of letters, the Government accomplished its purpose. Lacking in any logical probative value as to Petitioner's intent in distributing identity cards because of their remoteness, his admission of a prior false statement nonetheless struck at the heart of the defense, Petitioner's credibility.

Every accused electing to testify in a criminal action is subject to being confronted with the type of evidence introduced against Petitioner. Federal Rules of Evidence, 608 (b) specifically authorizes impeachment. However, Lloyd is the only federal appellate case

limiting the use of such evidence because of remoteness.

And, the opinion of affirmance here is a departure from the Court of Appeal's own precedent. This alone demands a definitive statement by this Court because it is an ever-present source of potential unfair prejudice to an accused, when testifying. Clearly, when eight year old events are considered as proper subject of cross-examination, lines of remoteness must be drawn.

Because Petitioner's credibility was effected by the impeachment process utilized in the District Court, it no doubt played a part in obtaining Petitioner's conviction. Therefore, it must be set aside.

CONCLUSION

The judgment below is inconsistent with decisions of this Court and various Courts of Appeal. It represents a diminution of the guaranties provided by the Fourth Amendment to the Constitution and decisions of this Court authored to protect a citizen from being convicted by the Government through the use of evidence obtained by an unreasonable search and seizure, as well as a reduction in the due process afforded to an accused from unfair and prejudicial methods of impeachment while testifying.

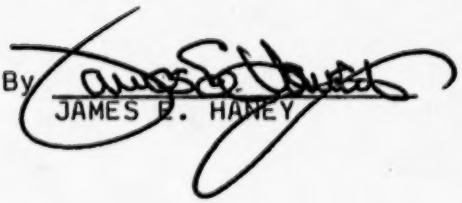
Therefore, this Petition for a Writ of Certiorari should be granted.

Dated: May 26, 1981

Respectfully submitted,

WEISENBERG, NELSON,
VIEFHAUS & LUTES

By
ROBERT M. VIEFHAUS

By 
JAMES R. HANEY

APPENDIX

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"A" OPINION
(Ninth Circuit Court
of Appeals
filed December 24, 1980)

"B" JUDGMENT
(United States District
Court for the Central
District of California
No. CR 79-476-WMB
filed September 17, 1979)

"C" ORDER DENYING PETITION FOR
REHEARING
(Ninth Circuit Court of
Appeals
filed March 30, 1981)

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	79-1655
	)	
v.	)	OPINION
	)	
BARRY LEE REID,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding
Argued and submitted June 3, 1980

Before: GOODWIN and ALARCON, Circuit Judges and THOMPSON,* District Judge

THOMPSON, District Judge:

Appellant Reid was convicted of mail fraud. The conviction stemmed

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*Honorable Gordon Thompson, Jr., United States District Judge, Southern District of California, sitting by designation.

from appellant's activities in connection with Eden Press, Inc., (Eden Press), of which appellant was president and sole stockholder. Eden Press produced and sold identification cards and various other items, including blank birth certificate forms, metallic Social Security card plates and pamphlet-type books.

On June 14, 1979, the Grand Jury returned a twelve-count indictment charging appellant with using the mail to carry out two separate schemes in violation of the mail fraud statute, 18 U.S.C. Section 1341. These charges were based on the advertisement and sale of the Eden Press identification cards.

Counts one through six of the

indictment charged appellant with a scheme to defraud the purchasers of Eden Press identification cards by leading them to believe they were purchasing official state identification cards. Eden Press's advertisements stated that the cards were "approved for every state" and that the cards were "official" or "official identification". The cards contained a state name in bold print at the top, a "registration number," an "expiration date" and a seal resembling that of the State of California. The seal bore the legend "Department of Resident Identification" around its circumference.

Counts seven through twelve of the indictment charged appellant with a plot to furnish fraudulent

state identification cards for unlawful use. Upon receipt of an inquiry about its identification cards, Eden Press would send out an inquiry packet. In addition to a flier advertising the identification cards, the packet would include fliers advertising pamphlet-type books and a catalogue card. The packet always would include a flier advertising a book called The Paper Trip. The Paper Trip flier listed such topics as: "Change your age for whatever purpose," "Avoid any or all creditors" and "Return from exile without detection." The catalogue card listed Eden Press books on subjects such as "check frauds," "con games" and "privacy from the tax man."

At the close of the government's case, the district court granted appellant's motion for judgment of acquittal as to counts seven through twelve of the indictment; the court denied appellant's motion as to counts one through six. The jury returned guilty verdicts on counts one through six.

The Search Warrant

On May 10, 1978, Postal Inspector Thomas C. Hall applied for and obtained a search warrant for the Eden Press offices. Appellant challenges the affidavit supporting Inspector Hall's application for the search warrant. The following numbered paragraphs summarize the contents of the affidavit.

1. The affidavit described Reid's connection with Eden Press

and the nature of Eden Press's business. Eden Press designed, advertised and sold birth certificate forms and identification cards by mail order. In conjunction with these items, Eden Press marketed various books, including books entitled The Paper Trip and 100 Ways to Disappear and Live Free.

2. The affiant, Postal Inspector Hall, had interviewed the publisher and principal manager of Orange City News. Orange City News had performed printing services for Eden Press since approximately September, 1976. These services included printing blank birth certificate forms, promotional flyers, mail order forms, catalogues and the Eden Press books entitled The Paper Trip and 100

Ways to Disappear and Live Free.

3. The affidavit described Special Agent Meyer's interview with the publisher of the Westminster Herald. The Westminster Herald printed blank personal identification cards for Eden Press.

4. Inspector Hall set forth in the affidavit information he had obtained from Detective Clark C. Corbin of the Fountain Valley Police Department. During February and March, 1977, Detective Corbin had made several mail-order purchases of birth certificates, identification cards, books and catalogues from Eden Press. The identification cards listed fictitious names, addresses and dates of birth next to pictures of

various police personnel.

5. In August, 1977, Inspector Hall had ordered an identification card and three birth certificates in the name of Thomas C. Rossi. He had received these items in the mail four days later. The affidavit described this transaction.

6. The affidavit quoted passages from the Eden Press books The Paper Trip and 100 Ways to Disappear and Live Free.[1]

7. On May 2, 1978, Inspector Hall had interviewed two Eden Press employees. One employee had worked for Eden Press since March, 1976; the other had worked for Eden Press since January, 1977. The employees described the manner of processing customer mail orders and the manner of preparing the finished

identification cards. The employees also provided Inspector Hall with a detailed description of the layout and contents of the Eden Press offices.

8. Inspector Hall had visited the Eden Press offices on May 5, 1978. He had observed a machine that appeared to be a camera and approximately 25-50 identification cards with photographs affixed and personal data filled in by typewriter (referred to as "mock-up" form ready for photographing). Inspector Hall also had observed cardboard boxes scattered around the room and several file cabinets.

The Eden Press offices were searched pursuant to the search warrant on May 10, 1978. The district court denied appellant's

pretrial motion to suppress the evidence obtained during this search. Appellant contends that the district court erred.

Appellant argues that the facts in the search warrant affidavit do not establish probable cause to believe that seizable items were located in the Eden Press offices as of the date of the warrant. He argues that the information in the affidavit was not sufficiently timely. Appellant relies on several facts. The magistrate issued the warrant on May 10, 1978. The purchases by the police detective had occurred in February and March, 1977. Inspector Hall had ordered and received his fictitious identification card and birth certificates in August, 1977.

Furthermore, appellant had changed the format and content of the identification cards and birth certificates in August or September, 1977, in order to comply with a preliminary injunction obtained by the Orange County District Attorney's Office. Neither the preliminary injunction nor the revised format are part of the record. Appellant contends that all criminal activity ceased when compliance with the preliminary injunction began. However, regardless of whether appellant's contention is true, we hold that the affidavit provided probable cause to believe that the items listed in the warrant could be found on May 10, 1978, at the Eden Press offices. The warrant listed four basic types of

seizable items: business records, a camera and document laminating machine, "mock-ups" of identification cards and stocks of blank identification cards and birth certificates. The business records consisted of customer lists, records of advertisements and of printing orders, financial records, original camera-ready art work, documents relating to authorship of promotional materials and documents evidencing the use of the United States mails. These are records that would be generated and maintained in the ordinary course of Eden Press's business. It was reasonable for the magistrate to expect that such materials would be found at the Eden Press offices. See, e.g., Andresen v. Maryland,

427 U.S. 463, 479 n. 9 (1976); United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977).

Inspector Hall, the affiant, personally observed the second and third types of items sought -- the camera and the "mock-ups" of identification cards. He set forth these observations in his affidavit. Probable cause as to these items was more than sufficient.

As to the fourth type of item sought, we will assume that only the blank birth certificates and identification cards in use prior to the August or September, 1977, format change would have constituted seizable evidence. The affidavit describes Eden Press's rather substantial orders of these items before the change in format

took place. Eden Press ordered 10,000 blank birth certificates in January, 1977, and 50,000 in March, 1977. The company ordered 75,000 blank identification cards in December, 1977. If this stock was not depleted by August or September, 1977, when Eden Press implemented the format change, it would be reasonable to believe that the unused stock remained at the Eden Press offices.

The question is not whether there were other places to which the items might have been removed, but rather whether the facts and circumstances taken as a whole gave the magistrate probable cause to believe that the desired items would be found in the search. United States v. Brinklow, 560 F.2d

1003 (10th Cir. 1977). The passage of time is not necessarily a controlling factor. Both the nature of the criminal activity involved and the kind of property for which authorization to search is sought are also important factors in evaluating probable cause. United States v. Steeves, 525 F.2d 33 (8th Cir. 1975); United States v. Lucarz, 430 F.2d 1051, 1055 (9th Cir. 1970). In this case, the time lapse did not destroy probable cause. The blank identification cards and birth certificate forms were not particularly incriminating in themselves; without evidence of appellant's intent to defraud, these items would have been of little consequence. The magistrate reasonably could infer that

Eden Press would have stored its unused stock in its offices. The district court correctly upheld the search warrant.

Prior False Statements

Appellant raises only one other issue worthy of discussion here. He contends that the district court erred in permitting limited use of appellant's prior false statements for impeachment on cross-examination.

Appellant testified at the trial. He described the development of Eden Press's business. Initially, Eden Press had only sold appellant's book about identification, The Paper Trip. The identification card business had evolved from sales of The Paper Trip.

On cross-examination, the

prosecutor questioned appellant concerning false statements in a letter appellant had written to a government agency while researching The Paper Trip in 1971. Appellant admitted that he had falsified his name, his occupation, the name of his business and his purpose in seeking information about official government identification. In each instance, the prosecutor simply asked appellant whether he had made the false statement. The letter itself was neither offered nor admitted into evidence. Appellant contends that the district court erred in allowing the prosecutor to ask questions about this letter.

Appellant placed his credibility in issue when he took the witness stand. Cross-examination

concerning the false statements in the letter was entirely proper to impeach appellant's general credibility. Fed. R. Ev. 608 (b) (1) gives the trial court discretion to permit cross-examination of a witness regarding specific instances of conduct concerning that witness's character for truthfulness or untruthfulness. The impeachment in the instant case consisted of appellant's own admissions of previous falsehoods. These falsehoods were probative of appellant's lack of truthfulness. See Lyda v. United States, 321 F.2d 788 (9th Cir. 1963). The fact that appellant made the false statements eight years prior to trial did not destroy the relevance of the statements for impeachment purposes.

The district court did not abuse its discretion in allowing the prosecutor to elicit admissions from appellant as to his deliberate use of false statements in 1971.

Appellant's remaining contentions are without merit. The judgment is affirmed.

F O O T N O T E S

[1] For example, the affidavit quoted the following excerpts from The Paper Trip:

> "THE PAPER TRIP provides the key ingredient for escaping social control: change of identity. While the purposes for changing one's identity may be as numerous as there are individuals, the basic methods are relatively few. The degree of 'completeness' in a person's new identity will depend upon his own needs. THE PAPER TRIP details all the levels of alternate identity and the methods for creating it."
>
> "THE PAPER TRIP is thus a plan of attack. The bureaucracies are to be rooked and conned with their rules, but without their knowledge, into creating new identities. Paper Trippers will make servants of the bureaucrats, and become the rightful masters of their own lives. If freedom is to exist, we must all be free to be who we want to be. THE PAPER TRIP leads the way."
>
> . . .
>
> "Let's take a look now at some of the very basic uses for

alternate identity. Although this isn't the main purpose of THE PAPER TRIP, it does help to realize that an additional ID can have many, many applications and even beneficial results. Let's get down to business."

"If you're still 'under age' the uses come immediately to mind. You might want to booze it up at a pub. You might want to be admitted to certain forms of restricted entertainment. You might want to join one of the armed services of (sic) join yourself to another person. Maybe you want to start driving a year or so early. Whatever. Get yourself a birth certificate, using one of the several techniques to be demonstrated and you can get virtually any other kind of ID you want--and at the age you need it!"

. . .

"When you think about it, alternate ID is used basically for two jobs. APPEARING and DISAPPEARING. You 'appear' in order to do something. You 'disappear' in order to get out of doing something. The ID you create will enable you to do whichever you like. As an example, you might want to take a greedy merchant with a check

or credit game. You 'appear' as Silas Ruebottom, obtain the merchandise, and 'disappear' with the goodies having paid but a trifle. Happens all the time."

. . .

"Along this same line is the practice of using a different name to rent a safe deposit box in order to hide cash valuables, or other gain from the prying interest of the tax boys. Endless possibilities here."

"For tax purposes, or other, you might want to invest in real estate or securities, but also (sic) want to keep these activities secret by using a solid alias. Those contemplating divorce should consider the future."

. . .

" In actual confidence games, impeccable ID is absolutely necessary. There are hundreds of swindles and scam operations (check and (sic) local library for several good books on the subject), but they all depend on first class ID. The same goes for ripping off merchants, professionals, banks, utilities, and insurance companies."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	79-1655
	)	
v.	)	JUDGMENT
	)	
BARRY LEE REID,	)	
	)	
Defendant-Appellant.	)	
	)	

On September 17, 1979 in the United States District Court, Central District of California, Docket Number CR 79-476-WMB, ROBERT M. VIEFHAUS appearing with defendant as his counsel of record, received a verdict of guilty. Defendant was convicted and charged with the offense of mail fraud, causing an act to be done, in violation of Title 18, United States Code, Section 1341, 2(b), as charged in counts one, two, three,

four, five and six of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years and fined in the sum of $1,000.00 as to each of counts one, two, three, four, five and six and that the sentence imposed as to imprisonment only, is to run concurrently and not consecutively, making a total term of

incarceration of three years and a total fine in the sum of $6,000.00.

It was further adjudged that the defendant should become eligible for parole at such time as the United States Board of Parole shall determine pursuant to Title 18, U.S.C. Section 4205 (b)(2).

It was ordered, upon motion of government, that counts 7, 8, 9, 10, 11, and 12 of the Indictment be dismissed.

Filed on September 17, 1979 by Edward M. Kritzman, Clerk, Lori Blitstien, Deputy Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	Filed 3-30-81
	)	
Plaintiff-Appellee,	)	79-1655
	)	
v.	)	ORDER
	)	
BARRY LEE REID,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: GOODWIN and ALARCON, Circuit Judges, and THOMPSON*, District Judge

The panel in the above case has voted to deny the petition for rehearing, and Judges Goodwin and Alarcon have voted to reject the suggestion for a rehearing en banc.

The full court has been advised

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*The Honorable Gordon J. Thompson, United States District Judge for the Southern District of California, sitting by designation.

of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.